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No. 07-129

In the Supreme Court of the United States

MOUSTAFA ELDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing under 21 U.S.C. 853(n)(2) to contest the criminal forfeiture of property that represents the proceeds of another person's crimes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 223 Fed. Appx. 837. The order of the district court (Pet. App. 9-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2007. A petition for rehearing was denied on May 1, 2007 (Pet. App. 16-17). The petition for a writ of certiorari was filed on July 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner's brother, Mahmoud Eldick, pleaded guilty in the United States District Court for the Northern District of Florida to one count of health care fraud, in

violation of 18 U.S.C. 1347, and one count of distributing hydrocodone, in violation of 18 U.S.C. 841(a)(1). After Mahmoud agreed to the forfeiture of certain real property and accounts, petitioner intervened and attempted to challenge the forfeiture. The district court held that petitioner lacked standing to challenge the forfeiture, and the court of appeals affirmed. Pet. App. 1-8.

1. Petitioner and Mahmoud operated a medical practice in Florida. They both provided medical services to patients, but Mahmoud was not a licensed physician. Mahmoud had fraudulently obtained, in a false name, a medical license and a registration number that allowed him to prescribe controlled substances. Mahmoud also illegally operated a pharmacy to which petitioner and Mahmoud referred their patients. Pet. App. 2.

In 2002, Mahmoud was charged with executing a scheme to defraud health care benefit programs and with dispensing controlled substances. The indictment contained a forfeiture count calling for the forfeiture of certain real property and brokerage and bank accounts. As part of a plea agreement, Mahmoud agreed to forfeit those properties pursuant to 18 U.S.C. 982(a)(7), which mandates the forfeiture of property "that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of" a federal health care offense. The United States informed the court that it would use the forfeited assets to compensate the victims of Mahmoud's fraud. Pet. App. 2.

2. After the district court entered a preliminary order of forfeiture, petitioner intervened and claimed that he had an interest in the forfeitable properties that was superior to the government's interest. Pet. App. 3. Forfeitures under Section 982 are governed by 21 U.S.C. 853 (2000 & Supp. V 2005), see 18 U.S.C. 982(b)(1),

which provides that "[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States * * * may * * * petition the court for a hearing to adjudicate the validity of his alleged interest in the property." 21 U.S.C. 853(n)(2). Such a third party must show that he either:

> (A) * * * has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) * * * is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. 853(n)(6).

Petitioner argued that his brother purchased the forfeitable assets with funds that he had unlawfully appropriated from petitioner, and that the assets therefore belonged to petitioner, not his brother, and were not subject to forfeiture for that reason. See Pet. App. 10. The district court rejected that contention because even if petitioner's allegations were true, "that would merely make [petitioner] an unsecured creditor of [Mahmoud]." *Id.* at 11. The court explained that "[u]nsecured creditors do not have standing to challenge forfeiture under" Section 853(n). *Ibid.*

3. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1-8. The court explained that because petitioner "concedes that he is not a bona fide purchaser" under Section 853(n)(6)(B), he could establish standing only by showing that he had "a legal right or interest in the forfeited property that is superior to that of the government" under Section 853(n)(6)(A). Pet. App. 3-4.

The court of appeals determined that, under his own theory, petitioner had "no legally cognizable interest in the forfeitable properties at all." Pet. App. 5. Petitioner argued that his work generated nearly all of the health clinic's profits, that he was therefore entitled to those profits, and that Mahmoud used those profits to buy the assets in question. *Ibid.* The court explained that petitioner "would have a cause of action against his brother for the fraudulent conversion of the proceeds of the practice and pharmacy," but that "as the holder of such a chose in action, [petitioner] is merely an unsecured creditor" without a legal interest in the particular assets in question. *Id.* at 6. The court declined to consider petitioner's argument that he had a legal interest in the properties under a state-law constructive trust theory, because petitioner "concede[d] that he did not present this theory to the district court." *Id.* at 4 n.2. The court rejected petitioner's argument that he had sufficiently preserved the issue by presenting sufficient facts and generally arguing for "disgorgement," because "[a] plaintiff may not impose upon the district court the burden of sorting out the facts, deciding which legal theories apply, and deciding which one is his best avenue to recovery." *Ibid.*

In addition, the court of appeals determined that, even if petitioner had a legal interest in the properties,

that interest was not superior to the government's. Pet. App. 6-8. "All right, title, and interest in [forfeitable] property * * * vests in the United States upon the commission of the act giving rise to forfeiture." 21 U.S.C. 853(c). Thus, the court explained that, in order for a claimant to have an interest superior to the United States' interest, "the claimant must have had a legal right, title, or interest in the forfeitable properties that *preceded* the commission of the crime that gave rise to the forfeiture of that property." Pet. App. 7. Here, however, "[t]he proceeds of Mahmoud's practice, including any real properties purchased or bank or brokerage accounts funded with those proceeds, were all acquired after the commission of his crime." *Id.* at 7-8. The court concluded that, because petitioner "has no interest that is superior to that of the government's in the forfeitable properties," he "does not have standing to challenge" the forfeiture. *Id.* at 8.

ARGUMENT

Petitioner contends (Pet. 5-10) that the court of appeals erred in holding that he lacks standing to contest the forfeiture. That claim lacks merit, does not implicate a circuit split, and does not warrant further review.

1. As the court of appeals held, petitioner does not have a legal interest in the forfeitable properties. Pet. App. 5-6. Petitioner has argued that Mahmoud acquired those properties with funds he had misappropriated from petitioner. See, *e.g.*, *id.* at 5. If true, that means that petitioner had a legal interest in funds that were diverted from him. But it does not mean that petitioner has a legal interest in any specific properties that Mahmoud purchased with those funds. See *id.* at 5-6.

Petitioner tries (Pet. 10-12) to bridge that gap with a state-law constructive trust theory. The court of appeals declined to address that asserted basis for an ownership interest in the forfeitable property, however, because petitioner "concede[d] that he did not present this theory to the district court." Pet. App. 4 n.2. The court of appeals acted well within its discretion in declining to consider that unpreserved claim, especially considering that it would have required the appellate court to determine, in the first instance, whether the requirements for a constructive trust under Florida law were satisfied. See Pet. 11 (invoking Florida law). Absent his untimely claim of a constructive trust, petitioner offers no legal theory for treating Mahmoud's properties as if they legally belonged to petitioner. Cf. Pet. 2 (conceding that petitioner "has no perfected security interest in the forfeited properties").*

The requirement that a claimant have a legal interest in the specific property to be forfeited (as opposed to a general claim against a criminal defendant) serves the important function of preventing forfeiture proceedings from devolving into general-purpose liquidation proceedings. *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1191-1192 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995). If general unsecured creditors could seek recovery in forfeiture proceedings, such proceedings would be unwieldy. Congress chose instead to permit the Attorney General to forfeit property in such circumstances, and then to exercise his discretion as to the appropriate disposition of the forfeited prop-

* Because the court of appeals acted within its discretion in declining to consider the constructive trust theory, petitioner's citation (Pet. 11-12) of various cases approving or disapproving such theories does not provide a basis for this Court's review.

erty. See 21 U.S.C. 853(i). Here, the United States has made clear that it intends to distribute the assets to Mahmoud's victims. See Pet. App. 2. If petitioner believes that he is one of those victims, he is free to petition the Attorney General for his fair share of the forfeitable properties. See 21 U.S.C. 853(i)(1). But he may not demand that a court award all or nearly all of those assets to him and him alone.

2. Even if petitioner had a legal interest in the relevant properties, he would have to show either that his "legal right, title, or interest in the property * * * was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or that he was a bona fide purchaser for value of the forfeitable properties. 21 U.S.C. 852(n)(6). Petitioner is neither.

As the court of appeals held, petitioner lacked a superior interest in the forfeitable properties at the time of the acts giving rise to forfeiture. See Pet. App. 6-7. The properties represent "[t]he proceeds of Mahmoud's practice, including any real properties purchased or bank or brokerage accounts funded with those proceeds," and "were all acquired *after* the commission of his crime." *Id.* at 7-8 (emphasis added). Because Mahmoud did not acquire the properties until after he committed the fraud, petitioner could not have had a superior interest in *those* properties at the time he was allegedly defrauded, as required by Section 853(n)(6)(A). Rather, upon commission of the offenses, "[a]ll right, title, and interest in [forfeitable] property * * * vest[ed] in the United States." 21 U.S.C. 853(c).

The petition for a writ of certiorari does not appear to dispute that point. Instead, petitioner argues in this Court (Pet. 6-9) that he is a bona fide purchaser for

value under Section 853(n)(6)(B). As the court of appeals explained, however, petitioner "concede[d]" below "that he is not a bona fide purchaser." Pet. App. 3-4. Because petitioner had conceded that question, the court of appeals did not address it. Thus, petitioner has forfeited his bona fide purchaser for value claim. Moreover, petitioner is not a bona fide purchaser of the forfeited property because he never purchased that property. Instead, he is merely an unsecured creditor of Mahmoud.

Petitioner suggests (Pet. 9) that the standing question turns only on whether he has a legal interest under Section 853(n)(2), not on whether he can also satisfy the superior-interest or bona-fide-purchaser requirements of Section 853(n)(6). Petitioner cites no basis for that assertion. Even if he were right, that contention would not assist him for two reasons. First, petitioner lacks a legal interest in the relevant properties, as discussed above. Second, the parties briefed, and the court of appeals reached, the question whether any interest of petitioner's was superior under Section 853(n)(6)(A). See, *e.g.*, Gov't C.A. Br. 26; Pet. C.A. Reply Br. 2 (arguing that petitioner's "property interests are superior"); Pet. App. 6-8. No further evidentiary development would be relevant to that inquiry, because it turns on the timing of Mahmoud's acquisition of the assets in question, which appears to be undisputed. Thus, the court of appeals committed no error in considering that question, much less an error that would warrant this Court's review.

3. Petitioner argues (Pet. 5-10) that the court of appeals' decision conflicts with the Fourth Circuit's 20-year-old decision in *United States* v. *Reckmeyer*, 836 F.2d 200 (1987). There is no conflict. In that case, one

claimant had loaned the defendant $25,000 in exchange for an option to purchase a parcel of land for that amount in the future. *Id.* at 202. Another claimant had delivered $38,900 in gems to the defendant, and had retained title to the gems, pending the defendant's sale of the gems to third parties. *Ibid.* The court held that the claimants had a legal interest in the defendant's property. It emphasized that general creditors "cannot claim an interest in any particular asset that makes up the estate." *Id.* at 206. In that case, however, the government had forfeited *all* of the defendant's assets, which meant, in the court of appeals' view, that the claimants' "interests necessarily lie within the estate." *Ibid.* The court then concluded that the claimants could recover because they were bona fide purchasers for value under Section 853(n)(6)(B). *Id.* at 207-208; see *id.* at 208 ("We conclude that * * * the term 'bona fide purchaser for value' must be construed liberally to include all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return.").

Petitioner asserts (Pet. 7-9) that courts of appeals have disagreed with *Reckmeyer's* holding that unsecured creditors can be bona fide purchasers for value. Any conflict on that question is irrelevant here, however, because the court of appeals did not reach that question in light of petitioner's concession that he was not a bona fide purchaser. See Pet. App. 3-4; cf. *United States* v. *Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003) (citing *Reckmeyer* for the proposition that "[t]he courts of appeals are split on whether an unsecured creditor may be considered a bona fide purchaser under § 853(n)(6)(B)").

Moreover, the facts of *Reckmeyer* were far different from the facts here. In that case, the claimants engaged in separate arms-length transactions with the defendant, and the court held that the claimants had a legal interest in the seized properties because the government had seized *all* of the defendant's property. *Reckmeyer*, 836 F.2d at 202, 205-206. In this case, in contrast, petitioner alleges that Mahmoud defrauded him in the course of his fraudulent practice of medicine and dispensation of drugs, and petitioner relies on a different traceability theory—that most of Mahmoud's income properly belonged to petitioner, and that Mahmoud's purchases should therefore be attributed to petitioner for this purpose. See Pet. App. 5. As a factual matter, petitioner's traceability argument is implausible, because Mahmoud made millions of dollars by defrauding patients. See Gov't C.A. Br. 22-23. For present purposes, however, the point is that *Reckmeyer* is distinguishable because it involved materially different facts and a different theory of traceability, and was also premised on a bona fide purchaser theory that petitioner disclaimed below.

Even if the result in this case conflicted with *Reckmeyer*, it would not warrant review. As noted, *Reckmeyer* is an older case that involved unusual facts, including the seizure of all of the defendant's assets. See *Reckmeyer*, 836 F.2d at 205-206. Moreover, this case would provide a poor vehicle for considering the alleged conflict, because the petition relies on a bona fide purchaser for value rationale that the court of appeals did not consider because petitioner had conceded that he was not a bona fide purchaser. See pp. 7-8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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